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Winter 2006

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Redevelopment and the Four Dimensions of Class in Land Use, 22 J.L. & Pol. 33 (2006)

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Redevelopment and the Four Dimensions of Class in Land Use

Audrey G. McFarlane

I. INTRODUCTION

A central question in local government law has been the debate over local autonomy: whether local governments are accorded enough space to initiate, implement, innovate, and possibly make mistakes in managing and governing.¹ The battle over the exercise of eminent domain² reflects this debate by presenting the question of the extent of a city's power to engage in redevelopment. Though the question is conceived of as what boundaries does property ownership place on a city's ability to reconfigure existing land uses to fit business-friendly norms for economic activity, the fundamental question is do we accept local economic development as a proper exercise of local governmental authority? In the abstract, the answer is yes. Pursuing economic development is an accepted and central project for states and local governments. Cities are geographically fixed, while everything that cities need to thrive is relatively mobile: people, companies, and jobs fluidly relocate to areas around the country and the globe almost seemingly as needed. Also, resources to finance local economic development activities have become increasingly limited as federal support has waned. Therefore, the local economic development project is a difficult one.³ The reality of economic development promotion is more difficult to swallow when the potential changes materialize into actually locating the desired economic or economic-related activity on land currently occupied by residential (and sometimes commercial) uses that stand in the way of the redevelopment plans for the land. What is particularly troubling about the reality of economic development is that 1) the economic activity sought is a directed one of meeting the social needs and consumption tastes of the affluent; 2) existing land uses are deemed in effect, not good enough; and 3) the redevelopment plan is carried out in a privatized process that is largely unaccountable to the public. In light of the reality of what economic development seeks to

¹ See GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 18-25 (2001); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

² *Kelo v. New London*, 126 S. Ct. 2655 (2005).

³ David Harvey, *From Managerialism to Entrepreneurialism: The Transformation of Urban Governance in Late Capitalism*, in GEOGRAFISKA ANNALER SERIES B: 71 HUMAN GEOGRAPHY 3-17 (1989), reprinted in THE BLACKWELL CITY READER 456 (2002).

accomplish and the manner in which it seeks to accomplish it, the issue of local governments' autonomy to engage in redevelopment for economic development purposes is suffused with socioeconomic class struggles over land use. Therefore, the changes wrought by redevelopment challenge us to think and talk about class in ways for which we are inadequately prepared. First, our ability to acknowledge distinct class harms is hampered by a current legal framework that largely denies that class is a relevant category that shapes lives, experiences, and opportunities.⁴ Second, the anti-discrimination paradigm of racial jurisprudence is unhelpful for a number of reasons but largely because it has been restricted to a search for racially motivated intention without regard to the racial impact, no matter how detrimental.⁵ Lastly, the class issue is possibly most difficult to acknowledge in the redevelopment context because class permeates the existing system of property ownership and land regulation. Thus far, the legal literature has failed to analyze the role of class in land use in any systematic or comprehensive way. Before we can critique redevelopment for its class biases, it is worthwhile to review the ways in which land use regulation in general makes and shapes choices that tend to favor distinct classes of people. These choices are generally difficult for us to acknowledge and consider, however, because of our simultaneous embrace and denial of class distinctions.⁶ This is attributable to the myth of America as a place of class mobility and economic transcendence. Some literature has indirectly acknowledged class by discussing the intersection of class and race and the disadvantageous effects of the combination of blackness and poverty,⁷ as well as the class-based privileges that middle or upper-middle class blacks fail to attain because their race is interpreted as an indication of lower class status.⁸ Although the lethal combination of race and (lower) class status is a category in and of itself, it is very important for us to distill the role that class plays in sorting opportunities for decent living conditions, life changes, and social integration. Our imperfect and limited discourse that we use to address discrimination and subordination on the basis of race is hampered further to

⁴ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁵ See, e.g., *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

⁶ In light of the continuing dualization of the economy into those with great wealth and those without, increasing interest has been focused on class distinctions and their impact on life opportunities and outcomes. See e.g., Janny Scott & David Leonhardt, *Shadowy Lines That Still Divide*, NY TIMES A1 (May 15, 2005) (Part I of multi-part series entitled CLASS MATTERS exploring the ways that "class influences destiny in a society that likes to think of itself as a land of unbounded opportunity.").

⁷ See, e.g., See John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1234 (1995).

⁸ See ELLIS COSE, *RAGE OF THE PRIVILEGED CLASS* 68 (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 147-51 (1995).

the extent we embrace or ignore class discrimination and subordination. An honest consideration of class issues must also consider the extent to which we, particularly the highly educated, are invested in class: we secretly believe in class, embrace it, benefit from it, and take a guilty pleasure in it. Though it is possible to have a divided mind on the relevance, acceptability, or perniciousness of class distinctions and subordination, the reality is we do not have the language to discuss class to allow us to precisely describe or account for laws with class effects. The challenge for legal scholarship is to critically examine the role that class has played in our economically segregated living patterns as a way to begin to think about the extent to which law can acceptably embody class distinctions and promote these patterns. We must distill the negative effects of the overwhelming sorting and subordination along class lines that is occurring. What impact does it have on the way we live and what about it fits within a discrimination paradigm as well as a subordination paradigm? As a first step in addressing the inherent conflicts surrounding class in the issue of redevelopment, this essay delineates a typology of four dimensions of class as it affects, interrelates, and operates with land use law and argues that the dimensions illustrate points of tension that must be considered and resolved in formulating redevelopment practices.

II. THE FOUR DIMENSIONS OF CLASS

“Land use law” is an important component of bringing redevelopment’s vision to fruition in light of competing views, interests, needs, and claims to land. The single most powerful component of land use regulation is zoning. Zoning is a regulatory overlay to a market-based real property ownership system that tracks class advantage and disadvantage. This is due to the truism that though the amount of property one can own is without limit, in reality people have different amounts of property. In light of the differing levels of access to property based on one’s economic resources, the issue is whether law can remain neutral in the face of these distinctions. It is well known that land use regulation has not been neutral to class and is embedded with subtle and not so subtle class distinctions.⁹ In fact, there are four relevant dimensions of class in land use. These dimensions are what I term the 1) use dimension; 2) market dimension; 3) identity-creation dimension; and 4) subordination dimension.

⁹ David Callies, *Village of Euclid v. Ambler Realty Co.*, in *PROPERTY STORIES* (Gerald Korngold & Andrew P. Morriss eds., 2004).

A. *The Use Dimension*

The working and middle class houses clustered together in redevelopment areas are clustered so because of zoning. Zoning attempts to promote the maximization of the use and enjoyment of property by protecting people from conflicting or incompatible land uses through strict segregation of types of uses. Zoning embodies both straight-forward practical logic as well as aspirational aesthetics.¹⁰ Clearly, separating heavy industrial uses from residential uses protects residents from being disturbed in their homes and protects industry from nuisance suits. The decision whether to separate commercial from residential uses was thought to be crystal clear as well. In the earliest zoning ordinances, segregation of commercial uses was done at the behest of retail merchants in New York City¹¹ to promote business, but as zoning spread, the separation of commercial from residential uses also became an effective method of fulfilling an aesthetic vision of the suburban ideal.¹² The idyllic pastoral community of single-family houses in a bucolic setting, undisturbed by commerce, sought to promote a particular vision of family life.¹³ This meant that earlier practices of integrating commercial and residential uses such as the corner store or apartments over small retail businesses were eliminated.¹⁴ The resulting segregation of residential from commercial land uses would have had a class effect by working to the disadvantage of the small entrepreneur/proprietor who would not only require inexpensive commercial space, but who would also benefit from the face-to-face interactions of a residential neighborhood setting. Because commerce of any kind was deemed inconsistent with residential uses, separation of commercial from residential land uses was, in effect, connected to the class position of the occupant of the property.¹⁵

¹⁰ See John J. Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 357-58 (1982) (arguing that aesthetic regulation exists primarily to promote cultural stability rather than visual beauty as is commonly assumed).

¹¹ See Raphaël Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, 64 J. AM. PLANNING ASS'N 170 (Mar. 1998).

¹² See William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317 (Feb. 2004) ("Zoning's original purpose was to protect homeowners in residential areas from devaluation by industrial and apartment uses that had been made footloose by trucks and buses around 1910-1920").

¹³ See generally ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* 3-17 (1987).

¹⁴ See Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: the Twilight of Zoning?*, 35 URB. LAW. 783 (Fall 2003) (accepting mixed-use development concepts in zoning codes).

¹⁵ The context for commercial segregation of uses also followed a racial path. The earliest zoning ordinances were directed at Chinese laundries. See, e.g., *In re Tie Loy* (The Stockton Laundry Case), 26 F. 611, 612-13 (D. Cal. 1886) (invalidating zoning ordinance whose purpose was to drive Chinese laundries

The mix of the practical and aesthetic logic of zoning also extends to the way in which zoning embraced separating types of people based on their chosen form of residential land use. Single-family residences were given top priority in the zoning regulatory scheme as the most protected use. Sizes of single-family homes were also regulated and separated: modest homes were excluded through large lot and luxury amenities requirements. Multi-family buildings were identified and excluded as a separate species of residential use.

Euclid v. Ambler Realty upheld zoning as facially valid under a nuisance-like rationale and accepted that apartment houses were undesirable in single-family residential districts.¹⁶ Since single-family homes, townhouses, and garden apartments are all residential uses, the main distinction between them seems strongly related to the presumed class position of the occupants of multi-family housing. As Judge Westenhaver expressed when *Ambler Realty* was heard in federal district court,

The result to be accomplished is to classify the population and segregate them according to their income and situation in life. The true reason why some ... live in a mansion and others in a shack ... is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service.¹⁷

Though the idea of segregation of uses seems so normal today, it must be remembered that it occurred within a context of mixed motives: much of the motives for declaring incompatible uses extended not only to types of uses (commercial v. residential, for example) but also to the identity of the types of people making the uses. The early attempts to regulate land use utilized both public and private regulatory mechanisms in the form of racial zoning and racially restrictive covenants.¹⁸ In the United States, it is impossible to discuss land settlement patterns and categorizations of people based on wealth without discussing racial categorizations and the dramatic role that race has and continues to play in land settlement patterns.¹⁹ Race as a historical fact is quite relevant to redevelopment as well because of the role that race played in the discriminatory formation of cities and suburbs. The segregation patterns we see today have also contributed to the availability of cheap and devalued land in the inner cities. The history of the federal government programs for

from the town).

¹⁶ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926).

¹⁷ *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924).

¹⁸ See Christopher Silver, *The Racial Origins of Zoning in American Cities*, in *URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY* 23 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

¹⁹ SHERYLL CASHIN, *THE FAILURES OF INTEGRATION* (2004). Cashin argues that our failure to pursue or achieve racial integration has contributed to a current racial and economic segregation that hurts all middle class people, irrespective of racial category.

mortgage insurance, highway, urban renewal, and public housing all interacted to reinforce, require, and facilitate private discrimination, contributing to the creation of the reviled "inner city." This is quite well-known in academic circles, although in some ways it is so well-known that perhaps the reality of it escapes many of us.²⁰ While the topic is familiar as an academic or historical matter, we forget about the reality that created these neighborhoods. In a conversation I had with two older Baltimore residents, I was reminded of the significance of these policies to the lives of Blacks who lived in the inner city.²¹ I was riding in a minivan with two senior members of a local community development corporation's board that worked to reverse blight and abandonment in a decayed neighborhood of formerly grand townhouses located on the edge of Baltimore's downtown. One board member, Ms. Watson, a seventy-year resident of the neighborhood, talked about what the neighborhood had been like forty years earlier. To my surprise, the other board member, Mr. Pierce, who I knew lived outside the city in the county, pointed to a row house and said, "My father used to own that house until the highway came through."²² He also pointed out a vacant corner where his father had owned another building. "You have to understand, Audrey," he said to me earnestly, "the neighborhood was nice, not like it is today. The houses were kept up, kids played in the street, doctors and lawyers, teachers, postman, laborers, they all lived here." After a brief pause while he directed the minivan around a corner, he added, "Because they couldn't go anywhere else. They couldn't cross North Avenue or Fulton Street." Even though I knew the answer, I still asked, "Why?" "You just couldn't," he said. I continued querying, "Because whites wouldn't sell to them?" "No, they wouldn't," he replied grimly, "and there were covenants that said you couldn't sell to blacks." I then asked Mr. Pierce, "Well, why was it called the ghetto if it was so nice?" "Because," Mr. Pierce responded, "even if it was decent, people felt they couldn't go anywhere else. You were confined as to where you could live." Ms. Watson interjected, "Once it opened up people moved out." I persisted in asking, "Well if it was so nice,

²⁰ See KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 203-209, 213-218 (1985) (discussing the Federal Housing Administration's role in embedding racial segregation in public policy and the real-estate market and contributing to the complexion of "white flight" to the suburbs and declining "black inner cities.").

²¹ Conversation with Carmena Watson and Arthur Pierce, Baltimore, Maryland (Sept. 2004).

²² For a discussion of the impact of the interstate highway program on American cities, see Robert Fishman, *The American Metropolis at Century's End: Past and Future Influences*, 11 HOUSING POL'Y DEBATE 199, 201-02 (2000), available at http://www.fanniemae.foundation.org/programs/hpd/pdf/hpd_1101_fishman.pdf, and MARK H. ROSE, *INTERSTATE EXPRESS HIGHWAY POLITICS 1939-1989* (1990 Rev. ed.) (history of the impact of the Interstate Highway Act of 1956 on cities).

why did people leave?" Mr. Pierce responded, "Because having been told they couldn't live anywhere else, people wanted to live wherever they could." Ms. Watson chimed in: "They wanted to get away from all that concrete." This conversation serves as a reminder of the lived reality behind the oft-recited statistics of legally-enforced racial segregation. The racial segregation that still exists today is complicated by our embrace of class discrimination. The overt exclusion is hidden behind a rubric of individual preferences and economically rational behavior. To the extent that the use dimension of class in land use regulation is not entirely separate from the logic of race and class, it cannot be separate from the social and economic exclusion and segregation we witness in today's landscape.

B. The Market Dimension

The regulation and segregation of land uses frames what is considered to be an otherwise *free* market. However, not only is land use about protecting use and enjoyment, but it has also evolved into a method for creating and protecting the economic value of real property. Therefore, the second overlapping dimension of class in land use is the market dimension. Maintaining a regularized property market through standardization and segregation of home types all provide a way to stabilize, determine, and measure market values.²³ The most significant aspect of the market dimension is the incentives that exist to support high property values in the resulting standardized market for real property. Exclusionary zoning, which consists of the restriction and segregation of home types to single-family residences on large lots, as well as the requirements of luxury amenities and occupancy restrictions, and prohibitions of multi-family and manufactured housing, when combined with private development, all contribute to housing unaffordability. Exclusionary zoning is also understood as a reflection of local governments catering to their homeowner majorities who actively work to protect their economic interests.²⁴ Local governments are further tied in to maximizing the creation of economic value, through the maintenance of a standardized land market, because it increases their tax ratables as houses on larger lots cost more and thus bring in higher property taxes. This encourages

²³ See generally WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE AND LAND USE POLICY 40-42 (2001).

²⁴ See Fischel, *supra* note 12; Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1061 n.51 (1998) (quoting Margalynne Armstrong, *Privilege in Residential Housing*, in PRIVILEGE REVEALED: HOW INVISIBLE PRIVILEGE UNDERMINES AMERICA 43, 53-62 (1996)) ("Property values reflect the vested economic interests of the landowner. A number of decisions, issued by both state and federal courts, have found that economic considerations can be used to justify exclusion of the poor, even when the impact is borne primarily by racial minorities.").

local governments to implement land use regulations that bring high economic value. Such "fiscal zoning" means that the structure of land use regulations are not based on the physical impact of uses on each other, but rather the impact, or perceived impact, of uses on property values. The market dimension of class in land use gives a property owner an economic stake in monitoring for and opposing uses that may have a real or imagined possibility of negatively affecting property values. Racial identity and patterns of segregation have contributed to land markets that tie the market dimension to racial discrimination. It is easy to pretend that economic motivation is the sole reason for these types of zoning and ignore the use of race and class as signifiers of persons and activities that present a perceived threat to the economic value of property. The market dimension has been used as a subterfuge in land use case law to cover-over underlying racial discrimination that is based upon a fundamental belief that "property ownership by African-Americans somehow intrinsically causes land to lose value. . . ."²⁵ Economic motivation is also tied to class based on the type of housing, with the belief that less expensive housing types threaten property values. This threat can only exist to the extent that zoning has created a norm of economic segregation.

The market dimension of class in land use is reflected in the doctrines of regulatory takings and due process anti-confiscation doctrines. These doctrines endeavor to protect property owners from real or perceived, uncompensated appropriations of property rights. Though the right to property includes a number of values, expectations, and types of enjoyment, the rights that are comprehended for the purposes of the takings doctrine are limited to losses of economic value as measured by investment-backed expectations.²⁶ This means that the doctrine operates to protect land uses that are recognized in the market as having exchange value, but ignores as unimportant the other use values placed on property that are non-economic, no matter how personal and strongly held.²⁷ The law of regulatory takings

²⁵ Margalynne Armstrong, *supra* note 24, at 1063; *see also id.* at 1062 n.60 (citing *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 373 F. Supp. 208, 211 (N.D. Ill. 1974) (upholding town's rejection of multi-family housing project against a claim of racial discrimination because "[t]he weight of the evidence prove[d] that the defendants were motivated ... by a legitimate desire to protect property values and the integrity of the Village's zoning plan.")).

²⁶ *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); *see generally Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *see also Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (requiring property owner to be compensated for government's lawful exercise to the right to a navigational servitude to a man-made marina in light of the property owner's substantial financial expenditures in creating the marina. Therefore, even though the government was within its rights, a taking had occurred).

²⁷ *See Margaret Jane Radin, Property and Personhood*, 34 STAN. L. REV. 957 (1982) (discussing how

has struggled, however, with this reification of economic value in doctrine because the language and psychology of property is really about more than economic value.²⁸ Nevertheless, those who are able to pay the most for property dominate the market and regulation operates to reinforce protection of those interests under the market dimension of class in land use. The market dimension is made all together more potent because the objective dollars and cents of the economic value of property is tied to the intangible of perceptions: the perceived positive or negative impact of the race and class associated with surrounding uses on a property's economic value is made real because market value is no more than what people are willing to pay for property.

C. Identity-Creation Dimension

The next dimension of class in land use is the identity-creation dimension – property ownership is constitutive of identity as well as a reflection of identity. Why is identity-creation important? Although one might think our identities are created merely by our intrinsic being, our identities are also created by relationships. Clearly our family and personal relationships create our identities,²⁹ but other relationships do as well. Our relationship to others provides a mirror that shapes who we believe we are. And within those relationships some will be taller or shorter, handsome or plain, stout or slim, richer or poorer, privileged or unprivileged, advantaged or disadvantaged. By grouping or categorizing people according to their characteristics we not only sort them for purposes of cataloguing the world around us, but also for finding our place within it. Although the list of binary distinctions is simplistic and relative (for example, a person can be rich when walking through a ghetto community, but impoverished when in an upscale gated community), it starkly portrays the sets of hierarchies in relationships in which we are all operating in relation to one another, as well as distinctions we may seek to attain and those we may seek to avoid. Therefore, while we may seek out people of a similar class because they have similar tastes, pursuits, and experiences and thus we feel comfortable with them, the reality is that those characteristics also allow us to obtain those connections by projecting a particular class identity to which others can connect. Class is not a

property may be important for personal meaning as well as exchange value).

²⁸ See Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91 (1995) (criticizing limiting the measure of takings to economically viable uses in the investment-backed expectations prong of regulatory takings doctrine).

²⁹ See, e.g., DALTON CONLEY, *THE PECKING ORDER: WHICH SIBLINGS SUCCEED AND WHY* (2004) (discussing how sibling birth order shapes life chances and paths).

biologically intrinsic human trait. Class is a set of social practices and therefore, just as race is a social construction, class too has to be created.

One can generalize that property ownership bestows certain privileges – the right to possess, the right to have the last say about access to the property, the right to dispose and exploit for profit, the right to leave it to one's children, and the right to tap into equity and finance other purchases, for example. The further you go up the class chain the more you attain a social status that accords you increasingly greater amounts of autonomy and freedom to enjoy the rights and privileges of property ownership. The class system essentially provides individuals differing abilities to attain a social status that will allow them to emulate some or all of the autonomy and freedom of the upper classes. The identity-creation dimension has to do with what ownership or consumption of different types of real property signifies to the world about who you are: what is your status? What rights and advantages do you have? What disabilities and disadvantages have you escaped?

Land use regulation facilitates this identity creation by using law to create places that physically construct a particular identity for the inhabitants. For example, a long-term observational study of a contemporary upper-middle class suburb demonstrated that physical landscapes are used to produce the American class system by conveying affluent social distinction and hierarchy. Residents used stringent aesthetic rules, zoning restrictions, and slow growth coalitions to protect their terrains.³⁰ Much literature illustrates how the role of identity and projecting one's identity is tied up in the suburban house and the concept of what is desirable in the suburban context.³¹ The identity-creation dimension of class in land use regulation has been shaped by the trend towards suburbanization, but that suburbanization has taken place and been shaped by the pursuit of a particular class aesthetic and ideal. What does the suburban identity mean? The answer depends on a particular set of possessions that you consume. According to the consumer lifestyle classification technique known as clustering or geo-demographics, there are a variety of types of suburban identities based on the type of house, shopping,

³⁰ See generally JAMES S. DUNCAN & NANCY G. DUNCAN, *LANDSCAPES OF PRIVILEGE: THE POLITICS OF THE AESTHETIC IN AN AMERICAN SUBURB* 61-62, 163-169 (2003).

³¹ See generally Delores Hayden, *Model Houses for the Millions: The Making of the American Suburban Landscape, 1820-2000*, Lincoln Institute of Land Policy (2000); see also Setha M. Low, *The Edge and the Center: Gated Communities and the Discourse of Urban Fear*, 103 AM. ANTHROPOLOGIST 45 (2001) (arguing that gated communities increase class separation and "produce[] a landscape that encodes class relations and residential (race/class/ethnic/gender) segregation more permanently in the built environment.").

car, employment, and leisure activities one chooses.³² *Belle Terre* sanctioned a town's ability to exclude renters from a single-family residential neighborhood by upholding occupancy limits based on consanguinity.³³ The *Mt. Laurel* decision also illustrates the identity-creation dimension. In that case, the New Jersey Supreme Court assured suburban communities in New Jersey that, notwithstanding constitutionally mandated inclusionary zoning, they should not fear having their community character changed by hordes of poor people being forced on their towns.³⁴

The identity creation of land use, however, is not limited solely to the suburban context. The current urban restructuring (also known as gentrification) taking place in inner cities is heavily predicated on this identity-creation dimension. The types of housing and housing amenities (historic, "yuppified" features, Viking stoves, recessed lighting), as well as the "luxury retail" formula that characterizes current commercial and entertainment venues are all carefully constructed to fulfill the need to create and project a certain class identity. They are also all predicated on certain classes of people not being present in order to solidify the image-projecting potential of the newly reconfigured neighborhood.³⁵ The real issue of the identity-creation dimension of class is what does it mean if you do not fit the profile?

D. Subordination Dimension

Critical theoretic approaches to legal analysis have tried to expand beyond the legal paradigm of anti-discrimination (which views the harms that are done to classes of people as based on individual acts of intentional discrimination) to a structural paradigm of anti-subordination. This shift in analysis acknowledges that even without an individual bad actor acting against another individual on the basis of legally-prohibited criteria, legal and societal structures can operate together to create a structure of disadvantage that relegates certain types of people to a disadvantaged position in society. That disadvantage is then reinforced by depriving them of access to the tools and conditions that would allow them to improve their condition.³⁶ Some of

³² See MICHAEL J. WEISS, *THE CLUSTERED WORLD: HOW WE LIVE, WHAT WE BUY, AND WHAT IT ALL MEANS ABOUT WHO WE ARE* 12 (2000) (considering the differences between suburbanites who live in lifestyle clusters labeled "Winner's Circle, Kids & Cul-de Sacs, Upstarts & Seniors and Greenbelt Families").

³³ *Vill. of Belle Terre v. Boraas*, 416 US 1. (1974).

³⁴ *S. Burlington County, NAACP v. Twp. of Mt. Laurel*, 456 A.2d 390 (N.J. 1983).

³⁵ See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, U. PA. J. CONST. L. (forthcoming 2005).

³⁶ See generally Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107

the tools of access are asset wealth, economic opportunity through access to finance, jobs and social connections to economic opportunities, education, and health. While structural arguments are subject to charges of being too reductionist and static and unable to adequately account for individual agency and circumstances, structural arguments are important because they allow us to understand that the choices people make, whenever they exercise their agency, are guided or limited by circumstances beyond their immediate control.

The subordination dimension of class in land use regulation arises from the other three dimensions. As discussed above, the use dimension is primarily the method by which law infuses land use regulation with class considerations and class effects. The market dimension relates to a process that deploys and uses class for economic purposes. The identity-creation dimension is a social product of social relations and of regulation. The subordination dimension is the effect or outcome of the other dimensions of class. The use categories have market and identity-creating effects that are subordinating because they are built on distinctions that work to the advantage of some and the disadvantage of others and incorporate those distinctions in ways such that people are socially, financially, and psychically invested if not attached to these distinctions. For example, the role of land use regulation in supporting stable if not lucrative property values is not only an aspect of the market dimension but also a significant subordinating aspect of class in land use. While depressed land values would be problematic, the flip side of the equation is that protecting property values through regulation operates to make property expensive and unaffordable.

Zoning require[s] the artificial creation of "affordable housing," because the rules...prohibit[] the very conditions that formerly made housing available to all income groups and integrated into the civic fabric. Accessory apartments became illegal in most neighborhoods, particularly in new suburbs. In many localities apartments over stores were also forbidden under zoning laws.³⁷

HARV. L. REV. 1841 (1994); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775 (1998); Darren L. Hutchinson, "Unexplainable on Grounds Other than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615; Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295 (1999); David D. Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427 (2000).

³⁷ James H. Kuntsler, *Home from Nowhere*, ATLANTIC MONTHLY, Sept. 1996, at 43, 61. On the other hand, New Urbanism and some modern infill retail developments allow mixed use development although this is still not the norm.

Not only does the current affordable housing shortage deprive people of access to shelter, it deprives a segment of the population the opportunity to own land and have access to wealth creation.³⁸ To the extent zoning contributes to elevating property values; scarcity of affordable housing deprives renters of the security of community.³⁹ This results in an effective shift of resources from one class of people to the benefit of another.⁴⁰

Another underappreciated consequence of the subordination dimension of class in land use is reflected in the implicit claim in *Kelo* that property ownership and desires for community are geographically prone or vulnerable in the cities.⁴¹ The central question in *Kelo v. New London* is whether taking property in furtherance of economic development satisfies the public use/public purpose prong of the Fifth Amendment's Takings Clause notwithstanding the benefit to private parties. This framing of the argument fails to communicate that the real issue is the vulnerability of certain types of property owners to redevelopment based upon their class position. Class has a very simple relationship to redevelopment and gentrification in the city. The neighborhoods that are most prone to redevelopment are those that are centrally-located or located on or near water, and have low property values and represent an opportunity for major profits from the redevelopment. These will be areas with dilapidated buildings or modest small homes. The vision for redevelopment is to socially and territorially alter the city into a place for affluent professionals to live, work, and play. Thus we have two competing sets of claims for land use in these neighborhoods. In this context, eminent domain effectively becomes a tool of social conflict-resolution. It is, however, an imperfect tool of conflict resolution because it fails to acknowledge competing needs – someone is usually left aggrieved. Moreover, it fails to acknowledge the impact of hierarchies of class domination that are endemic to the urban context. Eminent domain also fails to require any kind of compromise, mediation, or incorporation of the competing interests. This is due in particular to the privatized decision-making structures in local economic development. Cities enter into a variety

³⁸ See generally DALTON CONLEY, *BEING BLACK, LIVING IN THE RED* (1999).

³⁹ See Donald A. Krueckeberg, *The Grapes of Rent: A History of Renting in a Country of Owners*, 10 HOUSING POL'Y DEBATE 9 (1999) (arguing that land related public policy stigmatizes renters in such a way that represents a pernicious bias).

⁴⁰ This has been referred to as "the quiet redistributive mechanism of land use planning." DAVID HARVEY, *SOCIAL JUSTICE AND THE CITY* 100 (Edward Arnold 1973).

⁴¹ Community and personal ties are quite important to many people, but typically as one moves up the class ladder, the importance of community lessens, thus possibly making it more and more difficult for a mobile, professional elite to grasp. See Peter T. Kilborn, *The Five-Bedroom, Six-Figure Rootless Life*, N.Y. TIMES, June 1, 2005, at A1.

of public/private partnerships to plan and finance redevelopment.⁴² These entities are often left unchecked as they pursue often radical changes to residential, commercial, and retail amenities in order to satisfy the affluent professionals' consumption tastes.⁴³ Viewed from this perspective, local government loses its aura of respectability and takes on the image of the worst excesses of public power: overreaching, stealing private property, and outright corruption.

One of the many difficulties in raising the class claim is that class is not merely endemic to the eminent domain controversy, but endemic to the overall system of property ownership in general and land use regulation in particular. Property owners subject to redevelopment feel that they are being singled out for impairment of property rights because of their working class economic position and working class land use.⁴⁴ Redevelopment for the broad purpose of economic development appears to know of no inherent legal limit because the planned redevelopment seeks to put the property to uses that are more attractive to affluent professionals and thus will always be more economically lucrative than the land's current use. On the other hand, narrowing the definition of public use for class purposes, by delineating its use to specific circumstances, seems overly restrictive. The solution may be to clarify the definition of public purpose by specifying cities' obligations to exercise their powers for the general welfare.⁴⁵

III. CONCLUSION

The four dimensions of class in land use are meant to contribute to developing an awareness and language of class that rejects strict economic segregation as normal, desirable, and fair. Local governments should be given the space to engage in redevelopment for purposes of local economic development to the extent they also operate to combat the subordinating role

⁴² See generally JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 180 (1987).

⁴³ See Elvin K. Wyly & Daniel J. Hammell, *Islands of Decay in Seas of Renewal: Housing Policy and the Resurgence of Gentrification*, 10 HOUSING POL'Y DEBATE 711, 733-34 (1999) (discussing the phenomenon of gentrification surrounding urban blight with areas of renewal and wealth).

⁴⁴ The problems of environmental justice also illustrate the subordination dimension of land use. Certain communities are more prone to siting of toxic uses, less able to attract city services and enforcement of existing regulation and more likely to have compromised health conditions which track the racial and class composition of the neighborhoods. See generally Rachel Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807 (2004); Foster, *supra* note 36; Jon Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993).

⁴⁵ See McFarlane, *supra* note 34.

of class in land use through principles of community integration and participation. A community integration principle as a required norm for redevelopment and land use counteracts the subordinating effects of class in land use. Also, a participation principle that requires that those impacted by land changes should have a say in formulating the plan for change also would go a long way towards counteracting the subordination of class in land use. Class subordination in the redevelopment context highlights that problems of social justice are not merely about lack of equality. Talking about class subordination moves our focus beyond the equality principle to an understanding that some issues are truly about a principle of fundamental fairness. The problems of subordination cannot be solved by applying land use law equally, but rather requires attention to the ways in which the application of land use law in its social context operates to reinforce the disadvantage of some people based on their race and socioeconomic class.